Daviola Productions, LLC d/b/a Imaginarium *and* Brock Williamson. Case 28–CA–204315

March 5, 2018

DECISION AND ORDER

BY CHAIRMAN KAPLAN AND MEMBERS PEARCE AND MCFERRAN

The General Counsel seeks a default judgment in this case on the ground that the Respondent has failed to file an answer to the complaint. Upon a charge filed by Brock Williamson on August 14, 2017, the General Counsel issued a complaint on October 31, 2017, against Daviola Productions, LLC d/b/a Imaginarium (the Respondent), alleging that it has violated Section 8(a)(1) and (3) of the National Labor Relations Act. The Respondent failed to file an answer.

On December 22, 2017, the General Counsel filed with the National Labor Relations Board Motions to Transfer and Continue Matter before the Board and for Default Judgment. Thereafter, on January 3, 2018, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On January 17, 2018, the date responses were due, the United States Postal Service tracking system indicated that the order and Notice to Show Cause had not yet been delivered at either of the two addresses for the Respondent. Therefore, on January 18, 2018, the Board issued a Supplemental Notice to Show Cause, which was sent to the Respondent at those two addresses and to two addresses for the Respondent's registered agent, and it extended the deadline for the response. The Respondent filed a response to the Supplemental Notice to Show Cause.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively stated that unless an answer was received by November 14, 2017, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. Further, the General Counsel's motion discloses that the Region, by letter dated December 8, 2017, advised the Respondent that unless an answer was received by December 15, 2017, a motion for default judgment would be filed. Nevertheless, the Respondent neither filed an answer nor requested an extension of time to do so before any of the deadlines passed. In fact, it did not attempt to file an answer until February 1, 2018, when it responded to the Supplemental Notice to Show Cause by filing an Opposition to Motion for Default Judgment and Request for Permission to File Answer. This response was filed 11 weeks after the deadline for the answer, and 41 days after the General Counsel filed the Motion for Default Judgment with the Board.

Section 102.2(d) of the Board's Rules and Regulations provides that answers to a complaint "may be filed within a reasonable time after the time prescribed by these Rules only upon good cause shown based on excusable neglect and when no undue prejudice would result." Here, the Respondent did not file an answer to the complaint by the November 14 or December 15 deadlines. Nor did it request an extension of time to file an answer.[1] Such failure to promptly request an extension of time is a factor demonstrating lack of good cause. See, e.g., *Teamsters Local Union No. 455 (Cargill Meat Solutions Corporation)*, 364 NLRB No. 127, slip op. at 1 (2016); *V. Garofalo Carting*, 362 NLRB No. 170, slip op. at 1 (2015); *Day & Zimmerman Services*, 325 NLRB 1046, 1047 (1998).[2]

Further, the Respondent's assertions in its response to the Supplemental Notice to Show Cause do not demonstrate good cause for failing to file a timely answer. The Respondent argues that "Daviola's principals are from Luxembourg and they did not fully understand the gravity of failing to respond to the Board's processes." This argument does not establish good cause for failing to respond to repeated warnings in formal government documents. See, e.g., *Patrician Assisted Living Facility*, 339

[1] We reject the Respondent's argument that the Motion for Default Judgment should be denied because the General Counsel and the Charging Party were not prejudiced by the Respondent's failure to file a timely answer. It is not necessary to show prejudice before requiring the Respondent to comply with the Board's Rules. See *St. Regis Enterprises, LLC*, 364 NLRB No. 137, slip op. at 3 fn. 6 (2016); *Associated Supermarket*, 338 NLRB 780, 781 (2003).

[2] The Respondent notes that some correspondence relating to the case was mailed to it at the Las Vegas Boulevard South address of Tropicana Las Vegas, Inc. (Tropicana), instead of the Respondent's Dean Martin Drive address. Tropicana, however, is the Respondent's place of business; the complaint and a reminder letter sent there to the Respondent were not returned; and the Respondent does not claim that it did not receive the complaint. To the contrary, the Respondent appears to concede otherwise when acknowledging in its opposition to the General Counsel's motion that "the fact that Daviola did not initially timely respond is unfortunate." Further, as to the reminder letter, it is well established that, even if the Region had not issued a reminder letter prior to filing its motion for default judgment, it would not excuse the Respondent's antecedent failure to file a timely answer. See, e.g., *St. Regis Enterprises*, 364 NLRB No. 137, slip op. at 3 fn. 5.

NLRB 1153, 1154 (2003) (finding no good cause where respondent claimed a lack of legal knowledge and that it was unaware of the gravity of failing to file an answer); *Associated Supermarket*, 338 NLRB at 780–781 (finding no good cause where respondent argued that its owner was an immigrant whose first language was not English and that he was unsophisticated in legal matters and labor relations); *Printing Methods, Inc.,* 289 NLRB 1231, 1231 (1988) (finding no good cause where respondent argued its owner was an immigrant, unfamiliar with Board proceedings and had never been involved in an unfair labor practice case).

Nor is it an excuse that the Respondent, in its words, "[o]nly just recently . . . engage[d] counsel with experience and knowledge about the Board's policies and procedures." That the Respondent previously lacked knowledgeable counsel or, indeed, had no counsel at all, is not a basis for finding good cause for not filing a timely answer. See *St. Regis Enterprises*, 364 NLRB No. 137, slip op. at 2 & fn. 4.

We also reject the Respondent's arguments that the Motion for Default Judgment should be denied because there is an overlay of employee supervision and control among multiple entities involved in Williamson's employment, and because it would prejudice a parallel proceeding involving Williamson and Tropicana. These arguments neither address nor establish how the Respondent had good cause, based on excusable neglect, for failing to file a timely answer.

We also reject the Respondent's claim that the complaint fails to allege sufficient facts demonstrating a violation of the National Labor Relations Act. The complaint clearly and concisely describes the actions the Respondent took which constitute an unfair labor practice. The complaint states that the Respondent requested that Williamson be removed from its facility, an action which caused Williamson to be moved from full-time to on-call status, and to be removed from the Respondent's schedule of work. The complaint further alleges that the Respondent took this action because Williamson filed a claim under a collective-bargaining agreement that the Respondent applied to its employees,[3] and because Williamson formed, joined, and assisted the Union that was party to that agreement. Further, the complaint specifies the approximate dates for these actions. Thus, we find the complaint meets the clear and concise requirement for complaints articulated in Rule 102.15(b), and sets forth the legal causes of action.

Lastly, to the extent the Respondent argues that it did not engage in the alleged unlawful conduct, that Tropicana (and not it) is Williamson's employer,[4] or that there were lawful reasons for Williamson's removal, we find those defenses are not properly before us because the Respondent failed to show good cause for its late response. See *Perry Brothers Trucking*, 364 NLRB No. 10, slip op. at 2 (2016), and cases cited there.

Accordingly, in the absence of good cause shown for the failure to file a timely answer to the complaint, we deem the allegations to be admitted as true, and we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been a limited liability company with an office and place of business in Las Vegas, Nevada (the Respondent's facility), and has been engaged in producing live entertainment shows, including Imaginarium at the Tropicana Las Vegas Hotel and Casino in Las Vegas, Nevada.

Based on a projection since about May 22, 2017, at which time the Respondent commenced its operations, the Respondent will annually derive gross revenues in excess of $500,000 in conducting its operations, perform services valued in excess of $50,000 in States other than the State of Nevada, and purchase and receive at its facility goods valued in excess of $5000 directly from points outside the State of Nevada.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[5]

At all material times, International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, Local 720, AFL–CIO, CLC (the Union) has been a labor organization within the meaning of Section 2(5) of the Act.[6]

[3] Williamson's claim protested the treatment of employees by the Respondent's manager.

[4] Although the complaint terms Tropicana as "the Employer," it also alleges that the Respondent is "an employer" within the meaning of the Act, that Williamson is "the Respondent's employee," and that the Respondent is liable for the unfair labor practices alleged.

[5] The complaint also alleges that Tropicana is an employer engaged in commerce within the meaning of the Act, and it asserts certain financial information regarding Tropicana to support this allegation. We find it unnecessary to pass on these allegations because these findings would not affect the remedy.

[6] We take administrative notice that the Union is a labor organization within the meaning of Section 2(5) of the Act. See *Stage Employees IATSE, Local 720 (Tropicana Las Vegas, Inc.)*, 363 NLRB No. 148 (2016), enfd. mem. ___ Fed. Appx. ___, 2017 WL 6420455 (9th Cir. Dec. 18, 2017).

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

David Goldrake	-	Magician
Jake Roeber	-	Production Lead

At all material times, Tropicana and the Union have maintained in effect and enforced a collective-bargaining agreement covering wages, hours, and other terms and conditions of employment of certain employees of Tropicana at its facility (the Agreement).

At all material times, the Respondent has applied the Agreement to its employees.

About July 27, 2017, the Respondent's employee Brock Williamson filed a claim related to the Agreement in Tropicana's Human Resources regarding Jake Roeber's interactions with employees.

Around late July 2017, the Respondent requested Tropicana to remove Williamson from the Respondent's facility, and this caused Tropicana to move Williamson from full-time to on-call status around August 4, 2017, thereby removing Williamson from the Respondent's schedule of work for its employees. The Respondent engaged in this conduct because Williamson filed the claim with Tropicana's Human Resources and to discourage employees from engaging in these or other concerted activities. The Respondent also engaged in this conduct because Williamson formed, joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

CONCLUSIONS OF LAW

By the conduct described above, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act, and the Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization, in violation of Section 8(a)(3) and (1) of the Act. The unfair labor practices of the Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(1) and (3) of the Act by requesting Tropicana to remove Brock Williamson from the Respondent's facility, we shall order the Respondent to offer Williamson full reinstatement to his former full-time status, and if that job no longer exists to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed. Additionally, we shall order the Respondent to notify Tropicana that Williamson is allowed in the Respondent's facility and, if necessary to secure his reinstatement, to request that Tropicana reinstate Williamson to full-time status. Further, we shall order the Respondent to make Williamson whole for any loss of earnings and other benefits suffered as a result of the unlawful actions against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with our decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in pertinent part 859 F.3d 23 (D.C. Cir. 2017), we shall also order the Respondent to compensate Williamson for his search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center,* supra.[7]

The Respondent additionally shall be ordered to remove from its files any references to Williamson not being allowed in the Respondent's facility, to being moved from full-time to on on-call status, and to being removed from the Respondent's schedule of work, and it shall notify him in writing that this has been done and that the unlawful actions will not be used against him in any way. We shall further order the Respondent to compensate Williamson for any adverse tax consequences of receiving a lump-sum backpay award and to file with the Regional Director for Region 28 a report allocating the backpay award to the appropriate calendar years. *AdvoServ of New Jersey, Inc*., 363 NLRB No. 143 (2016).

[7] The General Counsel seeks a make-whole remedy that would include consequential damages incurred by the discriminatee as a result of the Respondents' unfair labor practices. The relief sought would require a change in Board law. Having duly considered the matter, we are not prepared at this time to deviate from our current remedial practice. See, e.g., *Laborers' International Union of North America, Local Union No. 91 (Council of Utility Contractors)*, 365 NLRB No. 28, slip op. at 1 fn. 2 (2017).

ORDER

The National Labor Relations Board orders that the Respondent, Daviola Productions, LLC d/b/a Imaginarium, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Requesting that its employees be removed from its facility—thus causing its employees to be moved from full-time to on-call status and to be removed from its schedule of work—because employees engaged in protected concerted activities and because of their support for and activities on behalf of the Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Brock Williamson full reinstatement to his former full-time status or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Within 14 days from the date of this Order, notify Tropicana that Williamson is allowed in the Respondent's facility, and, if necessary to secure his reinstatement, request that Tropicana reinstate Williamson to full-time status.

(c) Make Brock Williamson whole for any loss of earnings or benefits he may have suffered as a result of not being allowed in the Respondent's facility, being moved from full-time to on-call status, and being removed from the Respondent's schedule of work, in the manner set forth in the remedy section of this decision, plus reasonable search-for-work and interim employment expenses.

(d) Compensate Brock Williamson for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(e) Within 14 days from the date of this Order, remove from its files any reference to Williamson not being allowed in the Respondent's facility, being moved from full-time to on-call status, and being removed from the Respondent's schedule of work, and within 3 days thereafter, notify him in writing that this has been done and that the unlawful actions will not be used against him in any way.

(f) Within 14 days after service by the Region, post at its facility in Las Vegas, Nevada, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 4, 2017.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 5, 2018

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Marvin E. Kaplan, Chairman

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Mark Gaston Pearce, Member

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT request that Tropicana Las Vegas, Inc. (Tropicana) remove our employees from our facility, thus causing our employees to be moved from full-time to on-call status and to be removed from our schedule of work because employees engaged in protected concerted activities and because of their support for and activities on behalf of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Brock Williamson full reinstatement to his former full-time status or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, notify Tropicana that Brock Williamson is allowed in our facility, and, if necessary to secure his reinstatement, WE WILL request that Tropicana reinstate Williamson to full-time status.

WE WILL make Brock Williamson whole for any loss of earnings and other benefits resulting from his not being allowed in our facility, being moved from full-time to on-call status, and being removed from our schedule of work, less any net interim earnings, plus interest, and WE WILL also make Williamson whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Brock Williamson for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to Brock Williamson not being allowed in our facility, to being moved from full-time to on-call status, and to being removed from our schedule of work, and WE WILL within 3 days thereafter, notify Williamson in writing that this has been done and that the unlawful actions will not be used against him in any way.

DAVIOLA PRODUCTIONS, LLC D/B/A IMAGINARIUM

The Board's decision can be found at www.nlrb.gov/case/28-CA-204315 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.